IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

# STATE OF TENNESSEE v. ADRAIN KEITH WASHINGTON

**Appeal from the Criminal Court for Davidson County**
**No. 2006-B-1538 Steve Dozier, Judge**

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**No. M2008-01870-CCA-R3-CD - Filed February 24, 2010**

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Appellant, Adrain Keith Washington, appeals his conviction for aggravated sexual battery after a jury trial in Davidson County. Appellant was sentenced to twelve years in the Department of Correction. After a motion for new trial was denied, Appellant sought appeal. On appeal, Appellant argues: (1) the trial court erred by failing to instruct the jury on the State's election of offenses; (2) his conviction for aggravated sexual battery violates double jeopardy where he was acquitted of that offense in count one; and (3) his sentence is excessive. We determine that the trial court's failure to instruct the jury regarding election was harmless. Further, we determine that Appellant's conviction for aggravated sexual battery does not violate double jeopardy. Finally, the trial court properly sentenced Appellant. Therefore, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Jeffrey A. DeVasher, Assistant Public Defender, Nashville, Tennessee, for the appellant, Adrain Keith Washington.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson, District Attorney General, and Sharon Reddick, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### *Factual Background*

Appellant was a "family friend" of eight-year old S.P.,[1] the victim. In 2006, S.P. lived with her mother, N.C. and her father, E.P., in an apartment in Madison, Tennessee. S.P. had two younger brothers and a younger sister. S.P.'s mother came to the United States from Argentina the year before S.P. was born.

N.C. worked at a daycare facility during the day while her children either went to school or went to work with her. N.C. also worked on Saturdays as a housekeeper from approximately 10:00 a.m. until 7:00 p.m. When N.C. was at work on Saturdays, a family friend watched the children at their home. E.P. worked a varied schedule at a local cold storage facility.

In early March of 2006, E.P. was in the hospital. At the same time that E.P. was in the hospital, the family's regular babysitter was out of town. Appellant offered to babysit for the children while N.C. went to work on Saturday, March 4, 2006. Appellant had "a very good relationship with the children." He often helped the family out and "would always bring something for [the children]" like "movies or dolls." Appellant did not ask N.C. to pay him for babysitting, and Appellant arrived at the house that morning before N.C. left for work.

Sometime that afternoon, S.P. was playing outside with her friend Lauren, whose grandmother, Judy Troutt, lived upstairs. While the two girls were playing, S.P. told Lauren that Appellant did some inappropriate things to her while she was lying on the couch earlier that day. Lauren insisted that the girls tell her grandmother. The girls went upstairs and talked to Ms. Troutt who immediately called the police. When N.C. arrived home that evening from work, there were four police cars outside her apartment.

Shortly after Ms. Troutt called the police, Appellant knocked on her door. Appellant wanted S.P. to come back home. Ms. Troutt refused to let S.P. go anywhere with Appellant. Appellant "looked like he wanted to hit her or something" and appeared "very threatening and scary" to Lauren. Appellant tried to reach for S.P., but the police arrived and took Appellant into custody at that time.

S.P. was taken for a forensic interview and medical examination at General Hospital in Nashville shortly after the police arrived. S.P. told Lisa Dupree, a licensed clinical social worker and veteran employee of Our Kids Center, that Appellant touched her private with his fingers. S.P. reported to Ms. Dupree that Appellant did not touch her in any other manner. S.P. denied having

[1] It is the policy of this Court to refer to minor victim's of sexual abuse by their initials.

pain or bleeding and denied any prior instances of abuse by Appellant. S.P. later reported to a case worker that she was watching Hannah Montana on the Disney Channel when the incident occurred.

S.P. was examined by Sue Ross, a pediatric nurse practitioner and employee of Our Kids Center. Ms. Ross described S.P. as well-nourished and did not see any signs of chronic abuse or neglect. There were no physical injuries, including injuries to the genital and anal area. Swabs were collected from S.P.'s external genital area and anal area as part of the exam.

As a result of information gleaned from the investigation that was presented to the grand jury, Appellant was indicted in June of 2006 by the Davidson County Grand Jury for one count of rape of a child, one count of aggravated sexual battery, four counts of reckless endangerment, and one count of possession of a firearm.

At trial, S.P. testified that she was watching television on March 4, 2006, on the couch in the living room of her apartment. Appellant was sitting next to her on the couch. S.P.'s brothers and younger sister were in the back bedroom playing a Spiderman video game. S.P. reported that she fell asleep on the couch and woke up while Appellant was pulling her pants and panties down before he "got on top of [her] and started moving." S.P. used a pair of stuffed bears at trial to demonstrate Appellant's actions to the jury. S.P. reported that she kept her eyes closed during the encounter. According to S.P., Appellant's "private" touched her "private" on the "inside" and "it hurt." S.P. reported that Appellant did not touch her anywhere else on her body that day or with any other part of his body. S.P. remembered that Appellant covered them up with a "cover that had a moose on it."

When S.P.'s friend Lauren knocked on the door, Appellant got off of S.P. Appellant went to the bathroom while S.P. "pulled [her] pants up and opened the door." S.P. went outside to play with Lauren. S.P. reported the incident to Lauren, and the two girls went together to tell Ms. Troutt. S.P. reported to Lauren that Appellant "did sex to her." At trial, the trial court informed the jury that they were not to use S.P.'s statements to Lauren as substantive evidence. After the girls told Ms. Troutt about the incident, Ms. Troutt called the police. Appellant was arrested.

The arresting officers did not take a statement from S.P. because they had limited training in dealing with children. They called for a Youth Services Department sex crime detective to perform the interview. S.P. was taken to the hospital for an exam.

At trial, Ms. Ross from Our Kids Center testified that penetration of the labia majora, a mucosal surface, can occur without complete vaginal penetration. In other words, "you don't have to be inside the vagina to actually penetrate the genital area." According to Ms. Ross, there is a greater likelihood that there will not be injuries sustained where there is penile-genital penetration without vaginal penetration. Further, Ms. Ross testified that vaginal penetration with a finger is not likely to cause injury. Ms. Ross stated that, in her experience, children often report penetration based on the different feel of contact on a mucosal surface.

The swabs that were taken from S.P. were sent to a private laboratory for Y-STR testing. Margaret Ewing, a Senior DNA Analyst from Bode Laboratories, testified at trial about the testing done on the swabs taken from Appellant and the victim. The Y-STR testing procedure examines genetic markers on the Y chromosome, found only in males. The testing revealed a small amount of male DNA on the swabs taken from S.P.'s genital and anal area. These small amounts were described as non-sperm epithelial fractions. When compared with Appellant's DNA, Appellant could not be excluded as a match to the samples. There was only a partial profile available from the vaginal swabs, however, and it indicated that only fifteen percent of the male population matched the samples taken from S.P.'s genital area. The swabs taken from the perianal area were only based on retrieval of a single allele, which indicated that 62% of the male population matched the profile. The lab also ran DNA testing, including PCR and STR analysis on the swabs. A preliminary DNA test on the swabs revealed no male DNA. However, it was explained that the abundance of female DNA can mask male DNA.

The defense introduced proof that no seminal fluid was found by police investigators during an acid phosphate test of S.P.'s apartment on April 13, 2006. Further, the defense introduced a newspaper article to show that the Hannah Montana television show first aired in Nashville on March 24, 2006, after the date of the incident.

The defense also introduced evidence that the Department of Children's Services had investigated S.P.'s family on several prior occasions. In fact, E.P., S.P.'s father, had two prior convictions for two counts of attempted child neglect.

At the conclusion of the proof, the jury found Appellant not guilty of rape in count one. The jury convicted Appellant of aggravated sexual battery in count two. After a sentencing hearing, the trial court sentenced Appellant to twelve years in incarceration.

On appeal, Appellant argues that the trial court erred by failing to instruct the jury on the State's election of offenses; that his conviction for aggravated sexual battery violates double jeopardy where he was acquitted of that offense in count one; and that his sentence is excessive.

*Analysis*
*Election*

Appellant argues on appeal that the trial court erred by failing to instruct the jury on the State's election of offenses. Specifically, Appellant alleges that the trial court should have instructed the jury on election "[b]ecause the jury's verdict in counts [sic] two could have been based on either [S.P.'s] or Dupree's testimony, and because the jury was given no guidance as to which of these allegations formed the factual basis of either counts one or two." The State, on the other hand, argues that the State was not required to make an election of offenses because counts one and two required the State to prove different elements. Further, the State argues that it was clearly explained to the jury that the penile penetration formed the factual basis for the rape charge and the digital-genital contact formed the basis for the aggravated sexual battery charge.

The requirement of election and a jury unanimity instruction exists even though Appellant has not requested them. *See Burlison v. State*, 501 S.W.2d 801, 804 (Tenn. 1973). Rather, it is incumbent upon the trial court, even absent a request from the defendant, to ensure that the State properly makes an election in order to avoid a "'patchwork verdict' based on different offenses in evidence." *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993). Moreover, failure to follow the procedures is considered an error of constitutional magnitude and will result in reversal of the conviction, absent the error being harmless beyond a reasonable doubt. *See State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000); *see also Shelton*, 851 S.W.2d at 138.

The election requirement was first adopted in this state in *Jamison v. State*, 94 S.W. 675 (Tenn. 1906). In *Jamison*, the Tennessee Supreme Court held that proof of all sexual acts allegedly committed by the defendant against the victim could be admitted into evidence, but to avoid the prosecution of uncharged sex crimes, the State was required to elect the specific act upon which it was relying to obtain a guilty verdict. *Id.* at 676. Since that time, the election requirement has been applied almost exclusively in the sex crimes context, and specifically, when the defendant is alleged to have committed a series of sexual acts over a lengthy period of time against young children who are often unable to identify the exact date on which any one act was perpetrated. *See, e.g., State v. Brown*, 992 S.W.2d 389 (Tenn. 1999) (finding that the trial court erred in failing to require an election when the defendant was charged with rape of a child in a one count indictment that covered a six-month time frame, but the proof showed that at least ten instances of digital penetration occurred during the six months alleged, five occurring on one day and five others on different days); *State v. Walton*, 958 S.W.2d 724 (Tenn. 1997) (finding an election should have been required where sexual offenses were charged in a multi-count, open-ended indictment and where the child victim testified she was raped by the defendant or that he performed cunnilingus on her on a daily basis for over a year); *Burlison*, 501 S.W.2d at 804 (finding an election should have been required where the defendant was charged with having "carnal knowledge" of the victim on "diverse days between the summer of 1964 and August, 1969," but the proof did not show any particular date).

In 1994 however, *Jamison* was overruled to the extent it had established an exception to sex crimes that permitted proof of all sexual acts allegedly committed by the defendant against the victim, whether charged or uncharged. *See State v. Rickman*, 876 S.W.2d 824, 829 (Tenn. 1994) (overruling *Jamison* ). In *Rickman*, the court recognized that indictments often charge general time frames that encompass several months and, in those circumstances, the State may introduce evidence of sex crimes allegedly committed against the victim during the time frame charged in the indictment, but, at the close of the proof, the State must elect the facts upon which it is relying for conviction. *Id.* In fact, "it [is] the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense." *Burlison*, 501 S.W.2d at 804.

Our supreme court has consistently held that the prosecution must elect the facts upon which it is relying to establish the charged offense if evidence is introduced at trial indicating that the defendant has committed multiple offenses against the victim. *See State v. Kendrick*, 38 S.W.3d

566, 568 (Tenn. 2001); *Brown*, 992 S.W.2d at 391; *Walton*, 958 S.W.2d at 727; *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996); *Shelton*, 851 S.W.2d at 137. The requirement of election serves several purposes: (1) it enables the defendant to prepare for the specific charge; (2) it protects a defendant against double jeopardy; (3) it ensures the jurors' deliberation over and their return of a verdict based upon the same offense; (4) it enables the trial judge to review the weight of the evidence in its role as the thirteenth juror; and (5) it enables an appellate court to review the legal sufficiency of the evidence. *Brown*, 992 S.W.2d at 391.

In the case herein, the trial court mentioned election at the close of the proof, stating, "As I understand the State's theory and the proof from the discussions yesterday, we either have the touching for purposes of sexual arousal or gratification of a child under thirteen by [Appellant] or we don't and/or we have a sexual penetration by [Appellant's] penis [sic] into the vaginal opening of the alleged victim or we don't." Counsel for the State pointed out that it was digital/genital contact, not penile-genital contact. The trial court went on to note that the issue was Appellant "either touched with his hand her genital area or penetrated her genital area" and was unclear what "an election of offenses would clarify further." The trial court felt that "one occasion" during which "there was contact with [the] genital area and finger" as well as "penetration with the penis" could result in two counts submitted to the jury. Both the State and counsel for Appellant agreed.

On appeal, Appellant correctly points out that the trial court did not require the State to make an election of offenses and did not instruct the jury on election. However, during closing arguments to the jury, the State, of its own volition, specifically informed the jury that S.P. claimed Appellant "raped" her by taking his "private part" and put it "inside of her." The State also talked about the "second charge" of aggravated sexual battery where S.P., "Told the first case manager she spoke with that [Appellant] touched her digitally." Further, the State read the definitions of rape of a child and aggravated sexual battery to the jury. In other words, the State elected the factual basis that it was relying on to convict Appellant of each charge in the indictment by detailing the events that the State wanted the jury to consider on each count. The prosecutor clearly identified for the jury that it was the act of penetration of the victim's vagina with Appellant's penis on which the State was seeking a conviction for rape of a child and the act of touching the victim's vagina with his fingers on which the State was seeking a conviction for aggravated sexual battery. In its rebuttal closing argument, the State again informed the jury that there was testimony of vaginal penetration and digital/genital contact and that it was up to the jury to assess the credibility of the witnesses. This Court has previously determined that a trial court's failure to properly instruct the jury about the State's election may be harmless "where the prosecutor provides during closing argument an effective substitute for the missing instruction." *State v. William Darryn Busby*, No. M2004-00925-CCA-R3-CD, 2005 WL 711904, at *6 (Tenn. Crim. App., at Nashville, Mar. 29, 2005) (citing *State v. James Arthur Kimbrell*, No. M2000-02925-CCA-R3-CD, 2003 WL 1877094, at *23 (Tenn. Crim. App., at Nashville, Apr. 15, 2003)); *State v. Michael J. McCann*, No. M2000-2990-CCA-R3-CD, 2001 WL 1246383, at *5 (Tenn. Crim. App., at Nashville, Oct. 17, 2001), *perm. app. denied*, (Tenn. Apr. 1, 2002); *State v. William Dearry*, No. 03C01-9612-CC-00462, 1998 WL 47946, at *13 (Tenn. Crim. App., at Knoxville, Feb. 6, 1998), *perm. app. denied*, (Tenn. Jan. 19, 1999)). Based on our review of the entire record in this matter,

we conclude that any error was harmless beyond a reasonable doubt. The jury reviewed the evidence and acquitted Appellant of rape of a child and all lesser included offenses in count one and convicted Appellant of aggravated sexual battery based upon the conduct effectively elected by the State in closing argument. Appellant is not entitled to relief on this issue.

*Double Jeopardy*

Next, Appellant contends that his conviction for aggravated sexual battery violates double jeopardy because he was acquitted of that offense in count one. Specifically, Appellant argues that the State "presented proof of a single criminal incident" and that "[e]very offense on which the State submitted proof in this case was charged in count one" so when the jury acquitted Appellant of count one, "it should not have been allowed to revisit and reconsider the offense of aggravated sexual battery in count two." The State alleges that Appellant's conviction "does not violate double jeopardy because he was not prosecuted for the same offense after an acquittal."

The double jeopardy prohibition, which protects defendants from "twice being placed in jeopardy for the same offense," protects against (1) a second prosecution for the same offense following acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. U.S. Const. Amend. V; Tenn. Const. art. I, § 10; *North Carolina v. Pearce*, 395 U.S. 711(1969).

On appeal, it is the first of these protections that Appellant alleges has been violated. Ordinarily, when a defendant alleges that he has been subject to "a second prosecution for the same offense following acquittal," a second trial is involved, often where there is a mistrial or a deadlocked jury. In this case, Appellant was actually acquitted of count one, rape of a child, and all the lesser included offenses for the alleged penile/genital contact. The jury then found Appellant guilty of aggravated sexual battery in count two in the same trial for the digital/genital contact with the victim. In other words, Appellant was not subject to a second prosecution for the same offense following acquittal.

Appellant also seems to make an argument that his convictions violate double jeopardy based on protection three, that he received "multiple punishments for the same offense."[2] This analysis,

[2]When multiple sentences are imposed in a single trial, double jeopardy protection "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Multiplicity of charges or convictions arises in cases where prosecutors divide conduct into separate, discrete offenses, "creating several offenses out of a single offense." *State v. Charles L. Williams*, No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at *29 (Tenn. Crim. App., at Nashville, Nov. 29, 2006) (*quoting State v. Phillips*, 924 S.W.2d 662, 665 (Tenn. 1996)). Whether the acts of a defendant constitute separate offenses or one single crime must be determined by the facts and circumstances of each case. *State v. Pickett*, 211 S.W.3d 696, 706 (Tenn. 2007).

however, is unhelpful as Appellant did not receive multiple convictions for actions that arose out of one criminal episode. Appellant was convicted of only one crime, aggravated sexual battery.

Ordinarily, in order to determine whether multiple convictions arising out of a single criminal episode are permitted, this Court must: (1) conduct an analysis of the statutory offenses pursuant to *Blockburger v. United States*, 284 U.S. 299 (1932); (2) analyze the evidence used to prove the offenses; (3) consider whether there were multiple victims or discrete acts; and (4) compare the purposes of the respective statutes. *State v. Denton*, 938 S.W.2d 373, 381 (Tenn. 1996).

In the case herein, this analysis would be fruitless, because, as we have explained, Appellant did not receive multiple convictions from a single criminal episode. He was tried concurrently for two distinct charges that happened to occur during one criminal episode. The jury examined the evidence, acquitted Appellant in count one, and convicted Appellant as charged in count two. We see no double jeopardy issue that would warrant relief. This issue is without merit.

*Sentencing*

Lastly, Appellant challenges his sentence. Specifically, he argues that the trial court improperly applied two enhancement factors, resulting in an excessive sentence. The State disagrees, asserting that the trial court properly utilized its discretion and sentenced Appellant within the applicable range.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "[T]he presumption of correctness 'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the defendant wishes to make in the defendant's

behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

> When imposing the sentence within the appropriate sentencing range for the defendant:
>
> [T]he court shall consider, but is not bound by, the following *advisory* sentencing guidelines:
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> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c) (emphasis added). However, the weight given by the trial court to the mitigating and enhancement factors are left to the trial court's discretion and are not a basis for reversal by an appellate court of an imposed sentence. *Carter*, 254 S.W.3d at 345. "An appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

"The amended statute no longer imposes a presumptive sentence." *Carter*, 254 S.W.3d at 343. As a result of the amendments to the Sentencing Act, our appellate review of the weighing of the enhancement and mitigating factors was deleted when the factors became advisory, as opposed to binding, upon the trial court's sentencing decision. *Id.* at 344. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. *Id.* The trial court's weighing of various mitigating and enhancement factors is now left to the trial court's sound discretion. *Id.*

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See id.* at 343; *State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that "the trial court appl[ied] inappropriate mitigating and/or enhancement factors or otherwise fail[ed] to follow the Sentencing Act, the presumption of correctness fails" and our review is de novo. *Carter*, 254 S.W.3d at 345.

Appellant herein was convicted as a Range I, violent offender of aggravated sexual battery, a Class B felony. T.C.A. § 39-13-504. For a Class B felony, Appellant was subject to a sentence of "not less than eight (8) nor more than (12) years." T.C.A. § 40-35-112(a)(2). As noted, the trial court sentenced Appellant to twelve years for the aggravated sexual battery conviction.

The trial court applied several enhancement factors. The trial court found that Appellant had a prior criminal history in addition to that necessary to establish the range. *See* T.C.A. § 40-35-114(1). Further, the trial court noted that Appellant exposed the children for which he was caring to a firearm for which he did not have a permit. The trial court specifically found that Appellant abused a position of private trust as the babysitter of the children at the time of the aggravated sexual battery. *See* T.C.A. § 40-35-114(14). The trial court noted that the emotional injuries suffered by the victim were particularly great, as evidenced by her "two years of sexual abuse counseling," aggressive behavior toward her siblings, depression, and daily medication to treat her symptoms. *See* T.C.A. § 40-35-114(6). Finally, the trial court determined that the record reflected that Appellant was on probation at the time of the incident. *See* T.C.A. § 40-35-114(13)(C).

Appellant complains that the trial court improperly determined that the injuries suffered by the victim were "particularly great" and that he abused a position of private trust. The evidence at the sentencing hearing established that the victim had been undergoing treatment from doctors and psychologists since the incident, taking medication daily to control her depression and sleep difficulties. The "emotional injuries and psychological scarring sustained by the victim of a sexual offense" are the type of "personal injury" contemplated in enhancement factor (6). *State v. Melvin*, 913 S.W.2d 195, 203 (Tenn. Crim. App. 1995). Further, the testimony indicated that Appellant was a friend of S.P.'s family, gave S.P. presents, attempted to endear himself to her, and was entrusted with the care of the children while their mother was at work and their father was in the hospital. We find that under the facts presented in the record on appeal, the trial court properly determined that the victim's injuries were particularly great and Appellant abused a position of private trust. Even if the trial court had improperly applied these enhancement factors, the application of the remaining enhancement factors would support the enhancement of Appellant's sentence. As stated above, the enhancement factors are advisory. The trial court properly followed the sentencing procedures. Appellant is not entitled to relief from his sentence.

*Conclusion*

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE